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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT ARMIJO,

Plaintiff,

vs.

OZONE NETWORKS, INC. d/b/a OPENSEA, a
New York Corporation; YUGA LABS, LLC d/b/a
BORED APE YACHT CLUB, a Delaware limited
liability company; LOOKSRARE; and DOES 1 to
50,

Defendants.

Case No.: 3:22-cv-00112-MMD-CLB

**PLAINTIFF'S RESPONSE IN
OPPOSITION TO DEFENDANT
OZONE NETWORKS, INC.'S
MOTION FOR LEAVE TO SUBMIT
SUPPLEMENTAL AUTHORITY IN
SUPPORT OF MOTION TO STAY
DISCOVERY OR EXTEND
DEADLINES (ECF NO. 93)**

Plaintiff, Robert Armijo, by and through his counsel, Armstrong Teasdale LLP and Polsinelli, files this Opposition to Defendant Ozone Networks, Inc.'s ("OpenSea") Motion for Leave to Submit Supplemental Authority in Support of Motion to Stay Discovery or Extend Deadlines ("Motion to

Supplement”). This Response in opposition is made and based upon the following Memorandum of Points and Authorities, the exhibit attached to OpenSea’s Motion to Supplement, the papers and pleadings already on file herein, and any argument this Court may allow at the time of the hearing on the Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Local Rule 7-2(g), this Court should deny OpenSea leave to supplement because no good cause exists to allow supplementation. First, the recently decided authority that OpenSea seeks leave to submit, *Diep et al. v. Apple, Inc.*, No. 21-cv-10063-PJH, 2022 WL 4021776 (N.D. Cal. Sept. 2, 2022), is inapplicable to this dispute. In addition, OpenSea’s motion asks this Court to prematurely decide a disputed issue raised in OpenSea’s earlier Request for Judicial Notice wherein OpenSea asked this Court to take judicial notice of OpenSea’s Terms of Service in deciding a pending Motion to Dismiss. *See* ECF No. 73. Not only does Mr. Armijo vehemently disagree that the Terms of Service apply in this instance, but he has not yet had the opportunity to fully respond to this argument as the date for responding to the Request for Judicial Notice is still weeks away. For these reasons, the Court should deny OpenSea’s Motion to Supplement.

II. PROCEDURAL HISTORY

On July 29, 2022, OpenSea filed a Motion to Dismiss the First Amended Complaint (“FAC”), arguing that Mr. Armijo failed to state a claim. *See* ECF No. 71 (“MTD”). In support of the MTD, OpenSea also filed a Request for Judicial Notice requesting that this Court take judicial notice of OpenSea’s Terms of Service. Mr. Armijo’s response in opposition to both filings is not due until October 3, 2022.

In the interim, OpenSea filed a Motion to Stay Discovery or Extend Deadlines on August 3, 2022. ECF No. 80 (“Motion to Stay”). Therein, OpenSea argued that a stay of discovery is warranted because all of Mr. Armijo’s claims are barred by OpenSea’s Terms of Service. *See id.* at 5-6. On August 22, 2022, Mr. Armijo filed his Response in Opposition to the Motion to Stay expressly contesting the applicability of the Terms of Service to the instant dispute. *See* ECF No. 86 at 9-10. Mr. Armijo further explained that he will be objecting to OpenSea’s request for judicial notice and that any ruling by the

1 Court on the merits of whether the Terms of Service apply is premature. *See id.* at 10. OpenSea filed
 2 its Reply in Support of the Motion to Stay on September 2, 2022 (ECF No. 92), followed by the instant
 3 Motion to Supplement on September 8, 2022.

4 **III. LEGAL ARGUMENT**

5 A district court may “grant a request to supplement authorities on a showing of good cause.”
 6 *Hunt v. Washoe Cnty. Sch. Dist.*, No. 3:18-cv-00501-LRH-WGC, 2019 WL 4262510, at *3 (D. Nev.
 7 Sept. 9, 2019) (citing Local Rule 7-2(g)). “Good cause may exist either when the proffered
 8 supplemental authority controls the outcome of the litigation, or when the proffered supplemental
 9 authority is precedential, or particularly persuasive or helpful.” *Alps Prop. & Cas. Ins. Co. v. Kalicki*
 10 *Collier, LLP*, 526 F.Supp. 3d 805, 812 (D. Nev. 2021).

11 None of these guidelines apply here.

12 The *Diep* case was decided by a court in the Northern District of California and is, therefore,
 13 not a precedential decision binding on this Court. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011)
 14 (“A decision of a federal district court is not binding precedent in either a different judicial district, the
 15 same judicial district, or even upon the same judge in a different case.”) (citation omitted). Neither is
 16 the legal analysis in *Diep* “particularly persuasive or helpful” because the factual circumstances
 17 underpinning the *Diep* decision are substantially different than the factual circumstances between Mr.
 18 Armijo and OpenSea. *Cf. Alps*, 526 F.Supp. at 812 (the Court allowed nonprecedential supplemental
 19 authority because the case involved the same plaintiff, addressed the same policy provisions, and was
 20 based on similar factual circumstances). Finally, the *Diep* decision does not control the outcome of this
 21 litigation because *Diep*’s holding is limited by the facts presented in that case. The facts here are
 22 different, and the outcome in *Diep* has no bearing on this Court’s decision.

23 In *Diep*, the plaintiffs brought suit against Apple claiming that Apple was liable for the actions
 24 of a third party who posted a fraudulent application on Apple’s App Store that was designed to mimic
 25 a legitimate app. *See* 2022 WL 4021776 at *1. When users downloaded the fake app from the App
 26 Store, they became victims of a “phishing program” that was able to gain access to the users’ digital
 27 wallets, which then routed all the users’ cryptocurrency therein to the personal accounts of the hackers
 28 who created the fraudulent app. *See id.* In the complaint, the plaintiffs explicitly referenced Apple’s

1 Terms and Conditions in several paragraphs, and they did not dispute that their use of Apple's App
2 Store to download the fraudulent application was subject to the Terms and Conditions, including the
3 limitation of liability provision. *Id.* at *3, 7. When Apple requested that the court take judicial notice
4 of the Terms and Conditions based on these facts, the plaintiffs *did not object* to the court's
5 consideration of the Terms and Conditions. *Id.* The court therefore granted Apple's request.

6 Unlike the plaintiffs in *Diep*, who were customers of Apple and downloaded the fraudulent app
7 directly from Apple's App Store, Mr. Armijo was not a customer or user of OpenSea when he was
8 targeted and attacked by a scammer who stole his valuable Bored Ape Yacht Club ("BAYC") NFTs.
9 OpenSea itself clearly acknowledges this when it stated Mr. Armijo's BAYC NFTs were stolen "by a
10 third-party scammer operating not on OpenSea, but on a completely different, unaffiliated online
11 platform called 'Discord.'" Motion to Stay at 1. As such, Mr. Armijo's claims are not subject to
12 OpenSea's Terms of Service.

13 Likewise, Mr. Armijo has never conceded that he is subject to OpenSea's Terms of Service
14 with respect to this litigation, and he will be objecting to OpenSea's Request for Judicial Notice along
15 with filing his response in opposition to OpenSea's MTD when it is due in a few weeks' time. Mr.
16 Armijo also did not reference the Terms of Service at any point in his FAC, nor do the Terms form the
17 basis of his claims. *See id.* at *2-3 (The court relied on the "incorporation of reference doctrine" to find
18 that judicial notice of the Terms and Conditions was appropriate because the plaintiffs referred to the
19 Terms in their complaint.)

20 As set forth in Mr. Armijo's Opposition to OpenSea's Motion to Stay, discovery should only
21 be stayed based on a pending dispositive motion "when there are no factual issues in need of further
22 immediate exploration, and the issues before the Court are purely questions of law that are potentially
23 dispositive." *Brennan v. Cadwell Sanford Deibert & Garry LLP*, No. 2:20-cv-00799-JAD-VCF, 2020
24 WL 5653673, at *2 (D. Nev. Sept. 22, 2020). OpenSea's Motion to Supplement further illustrates the
25 fact that the dispute over whether OpenSea's Terms of Service apply is a factual issue on which the
26 parties fundamentally disagree. Consequently, a stay of discovery is disfavored in this case, and no
27 good cause exists to allow OpenSea to supplement the record.

28 For the foregoing reasons, OpenSea's Motion to Supplement should be denied.

VI. CONCLUSION

The Court should deny OpenSea's Motion for Leave to Submit Supplemental Authority in Support of Motion to Stay Discovery or Extend Deadlines and allow discovery to proceed as ordered in the July 21, 2022 Scheduling Order.

DATED this 16th day of September 2022.

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CERTIFICATE OF SERVICE

Pursuant to Fed.R.Civ.P.5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of ARMSTRONG TEASDALE LLP, and that the foregoing document:

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An employee of Armstrong Teasdale LLP